

**IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF ALABAMA
EASTERN DIVISION**

| | | |
|--------------------------------------|---|---|
| KIM S. SMITH, |) | |
| |) | |
| Plaintiff, |) | |
| |) | |
| v. |) | CIVIL ACTION NO. 3:07-cv-248-WHA |
| |) | |
| DEBORAH HARDWICK |) | |
| GROSSMAN, R.N., B.S.N., J.D., |) | |
| |) | |
| Defendant. |) | |

**DEFENDANT'S REPLY TO PLAINTIFF'S RESPONSE TO
DEFENDANT'S MOTION TO DISMISS AMENDED COMPLAINT
AND RESPONSE TO PLAINTIFF'S MOTION TO AMEND COMPLAINT**

COMES NOW the Defendant, by and through counsel, and files this reply and response to Plaintiff's Motion to Dismiss and Motion to Amend Complaint, and states as follows:

1. The Defendant agrees that should the amended complaint be allowed, it will likely moot many of the alleged deficiencies contained in the original complaint.
2. The Defendant maintains that the fraud count contained in paragraphs 43-49 does not state a cause of action. At best, the allegations consist of a breach of promise to perform a future act which, if proved, could sustain a cause of action for breach of contract. However, there is no allegation of misstatements of fact relied upon by the Plaintiff to her detriment. Instead, Plaintiff complains that the Defendant failed to perform a future act, without alleging a present intent not to perform the act. Such allegations fail to state a cause of action for fraud under Alabama law. *Saia Food Distributors & Club, Inc. v. SecurityLink from Americatech, Inc.*, 902 So. 2d 46 (Ala. 2004); *Arthur Rutenberg*

Homes, Inc. v. Norris, 804 So. 2d 180 (Ala. 2001); *Campbell v. Namans Catering, Inc.*, 842 So. 2d 654 (Ala. 2002).

3. If the motion to amend the complaint is allowed by the Court, the Defendant respectfully requests 20 days in which to file an answer and counterclaim.

Respectfully submitted,

s/ George L. Beck, Jr.

George L. Beck, Jr. (BEC011)

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CERTIFICATE OF SERVICE

I hereby certify that on October 11, 2007, I electronically filed the foregoing with the Clerk of the Court using the CM/ECF system, which will send notification of such filing to the following:

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s/ George L. Beck, Jr.

George L. Beck, Jr. (BEC011)